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CONFUSION OF THE DOCTRINE OF EQUITABLE ELECTION WITH ESTOPPEL BY DEED. — When a testator leaves property by will to A and purports to leave to B property belonging to A, equity considers it unconscionable for A to take the benefit under the will and, at the same time, to defeat the testator's intention as to B by retaining his own property. It therefore compels him to elect to surrender either his own property or his rights under the will.<sup>1</sup> A similar principle had been applied to wills in the civil law.<sup>2</sup> The English equity courts first applied it to wills,<sup>3</sup> and later extended it to deeds.<sup>4</sup> It had, however, no relation to the doctrine of estoppel by deed, which was much older and rested on distinct principles.

Estoppel, whether by record, by deed, or *in pais*, was originally a principle of the law of evidence. As the court would not allow proof of a fact contrary to a judgment of record on the same issue between the same parties, so it excluded all ordinary testimony that a statement under seal was contrary to fact,<sup>5</sup> or that one who performed a solemn act *in pais*, such as livery of seisin,<sup>6</sup> was without authority to do so. When, however, a jury found by special verdict that the facts were inconsistent with the statements in the deed or the solemn act *in pais*, the court passed on the facts as the jury found,<sup>7</sup> for the declaration of the jury was evidence of a higher nature. In other words, estoppel established no substantive rights, but merely excluded evidence of a lower character in rebuttal. And modern cases which have held that substantive rights have been acquired by estoppel, may usually be supported on some other ground.

When courts, therefore, following earlier *dicta*,<sup>8</sup> have decided cases by adopting as a rule of substantive law that he who takes under an instrument, whether deed or will, is estopped to deny the truth of any statement in the instrument, they have confused a mistaken conception of estoppel by deed with the doctrine of equitable election; and unjust results have naturally followed. Thus, when a testator bequeathed to A only that to which she was by law entitled and to B property belonging to A, the Supreme Court of North Carolina recently held that A, by proving the will and acting thereon, had elected to take under it, and was bound by the other provisions of the will to give her property to B. *Trip v. Nobles*, 48 S. E. Rep. 675. Obviously the doctrine of estoppel by deed should not apply, and there is no reason for equity to take away A's property and give it to B; for A received no substantial benefit to charge her conscience, nor, on the other hand, could B have received anything, had A elected against the will.

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NATURE OF THE RIGHTS OF AN ESTOPPEL-ASSERTER. — Although there are suggestions in different cases that estoppel is purely personal in its nature and consequently operates only in favor of the person originally mis-

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<sup>1</sup> *Streatfield v. Streatfield*, Cas. t. Talb. 176.

<sup>2</sup> Inst. lib. 2, tit. 20, s. 4; tit. 24, s. 1.

<sup>3</sup> *Locy v. Anderson*, Ch. Cas., ed. 1870, 155; *Noys v. Mordaunt*, 2 Vern. 581.

<sup>4</sup> *Bigland v. Huddleston*, 3 Bro. C. C. 285 n.

<sup>5</sup> Lit. 58; 34 H. VI, 48.

<sup>6</sup> Co. Lit. 352 a.

<sup>7</sup> *Sutton v. Dicons*, Sav. 98; *Goddard's Case*, 2 Co. 4 b.

<sup>8</sup> *Doe d. Devonshire v. Cavendish*, 4 T. R. 743 n., *per* Lord Mansfield; *Wilson v. Townshend*, 2 Ves. Jun. 696, *per* Lord Loughborough. Cf. also *Goodtitle v. Bailey*, Cowp. 601.

led,<sup>1</sup> it is clear on authority that an innocent purchaser from such person is protected.<sup>2</sup> It may be argued, however, that a purchaser with notice is entitled to no such protection, inasmuch as he is not deceived. If this view were adopted, the result would be that one who acquired a right by estoppel would be unable to realize upon it in case the facts became known to the world. Thus if he should obtain by estoppel land or a chattel, he would be forced to retain it for his own use forever; and upon his death, since no one taking with notice could set up the estoppel, it would revert to the former owner. Or if the property so acquired were a note not yet due, he could not negotiate it, and if it did not fall due within his lifetime, there could be no recovery. If, however, it is objected that these rights would pass to the heir and the executor respectively on the theory that they continue the legal existence of the deceased, the estoppel would then violate the policy of the law against restraints on alienation by creating a right descendible but not transferable.

The suggestion approved in a recent case decided by a federal circuit court in Iowa, that the transferee with notice of negotiable paper, which is valid only by estoppel, be allowed to recover merely the amount he paid for it, does not obviate the difficulties, as it would afford little practical relief to the original estoppel-asserter. *Gamble v. Rural Independent School District*, 132 Fed. Rep. 514. His interests can be adequately protected only by holding that a subsequent purchaser who takes with knowledge of the facts, is fully protected.<sup>3</sup> This view, likewise, would recognize estoppel in its true light as creating a right equitable in its nature and freely transferable like other property interests. As it would be destructible like other equitable rights, a *bona fide* purchaser from the one estopped would take free from the equity.<sup>4</sup> This would not be true, of course, of estoppel by deed where, as in many states, that is a distinct doctrine giving rise to legal rights and confined in its application strictly to transfers of land.<sup>5</sup> But regarding estoppel *in pais* in this light, the question of knowledge or the amount of consideration paid by the assignees of this equitable right would become irrelevant.

**LIABILITY FOR INTERFERENCE WITH UNLAWFUL OBSTRUCTION IN HIGHWAY.**—It is well established that a person who is inconvenienced by an obstruction in a public highway may remove it.<sup>1</sup> In so doing, however, he must not commit a breach of the peace,<sup>2</sup> and must do no more damage to the obstacle than is reasonably necessary.<sup>3</sup> To those using the highway there is a further duty not to create a more serious obstruction. For example, a street railway company, which has the right to remove snow from its tracks, must not pile it up in such a way as to interfere unnecessarily with the use of the street.<sup>4</sup>

In view of these decisions, what should be the duty imposed upon one

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<sup>1</sup> See *Shillito Co. v. McClung*, 51 Fed. Rep. 868.

<sup>2</sup> *Kinnear v. Mackey*, 85 Ill. 96.

<sup>3</sup> *Anderson v. McPike*, 86 Mo. 293.

<sup>4</sup> *Rutz v. Kehn*, 143 Ill. 558.

<sup>5</sup> *Knight v. Thayer*, 125 Mass. 25.

<sup>1</sup> *Inhabitants of Arundel v. M'Culloch*, 10 Mass. 70.

<sup>2</sup> *State v. White*, 18 R. I. 473.

<sup>3</sup> *Mark v. Hudson, etc., Co.*, 103 N. Y. 28.

<sup>4</sup> *Bowen v. Detroit City Ry. Co.*, 54 Mich. 496.